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Drug Policy and Human Resources

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Chairman Mica, members of the Subcommittee, I am John Steer, a Member and Vice Chair of the United States Sentencing Commission (the "Commission"). I appreciate the opportunity to testify today about drug sentencing trends, mandatory minimum penalties, and how these statutory penalties interact with the federal sentencing guidelines. As you may know, on November 15, 1999, a full complement of seven voting commissioners was appointed to the Commission after a hiatus of more than a year during which there were no voting commissioners. As a group, we bring extensive and varied experience to our new jobs. Among the seven voting and two non-voting members of the Commission, five are federal judges, three have prosecutorial experience, two have criminal defense experience, two formerly were police officers, and several have had prior experience working as congressional staff. Two things we all have in common are our desire to (1) strengthen the Commission's good working relationship with Congress and others in the federal criminal justice community, and (2) maintain and improve the federal sentencing guideline system.

At the outset, let me state that all of the new commissioners are keenly interested in and concerned about drug sentencing policy. And this interest, of course, is no coincidence. Drug offenses account for approximately 40 percent of all criminal cases in the federal system, and over 150,000 drug offenders have been sentenced under the guidelines since 1989. Frankly, however, our initial work

primarily has focused on other issues – principally economic crimes, offenses involving new technologies, and sex offenses against children – as we sought to develop guidelines for a significant backlog of crime legislation and sentencing-related legislation from the 105th Congress that had accumulated during the unprecedented absence of commissioners. Accordingly, upon our appointment, we unanimously agreed that addressing these many legislative items should be our first priority for the abbreviated guideline amendment cycle that just ended on May 1, 2000.

Because we have been so busy clearing the backlog of legislative items, as a group we have not had an opportunity to discuss in great detail our views on drug sentencing policies and, thus, have not formulated “Commission” positions on these matters. We are planning to meet for three days later this month to begin our planning for the next amendment cycle and beyond. In the meantime, I can share with you some “historical” views the Commission has expressed on drug sentencing issues – views with which I am familiar because of my previous service as the Agency’s general counsel (from 1987 until my appointment). I can also share with the Subcommittee a variety of data regarding drug sentencing practices that the Commission regularly collects and analyzes.

I am pleased to report that our new Commission’s efforts to focus on outstanding legislative matters in its first amendment cycle was very productive. Last week the Commission submitted to Congress for its review guideline amendments that respond to the No Electronic Theft Act of 1997, Pub. L. 105 -147, 111 Stat. 2678, the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105 -184, 112 Stat. 520, the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105 -314, 112 Stat. 2974, the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105 -318, 112 Stat. 2974, the Wireless Telephone Protection Act, Pub. L. 105 -172, 112 Stat. 53, firearms

provisions contained in Pub. L. 105 -386, 112 Stat. 3469, and, most relevant to today's hearing, the Methamphetamine Trafficking Enhancement Act of 1998, Pub. L. 105 -277, Division E, 112 Stat. 2671.

The Methamphetamine Trafficking Enhancement Act of 1998 increased the statutory mandatory minimum penalties for methamphetamine offenses by cutting in half the quantity of pure substance and methamphetamine mixture that trigger separate five and ten year mandatory minimum sentences. Under the Act, five grams of methamphetamine (pure), or 50 grams of methamphetamine mixture, trigger the five year mandatory minimum sentence, and 50 grams of methamphetamine (pure), or 500 grams of methamphetamine mixture, trigger the ten year mandatory minimum sentence. The Act did not direct the Commission to amend the guidelines and, therefore, it was not legally required to do so. However, as I will explain more fully below, the Commission generally anchors its guideline penalties to the statutory mandatory minimum sentences. Consistent with that approach, the Commission passed an amendment that cuts in half the quantity of pure substance that corresponds to five and ten year sentences under the guidelines. The Commission did not amend the guidelines with respect to methamphetamine mixture because, in 1997, in response to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. 104 -237, 110 Stat. 3099, the Commission had modified the guidelines for methamphetamine mixture offenses in such a way that they were already aligned with the 1998 legislation.

With that background, I would like to focus the remainder of my testimony today on three areas: (i) the historical development of the principal statutory and guideline framework that underpins drug sentencing today, (ii) the operation of these policies over time, and (iii) some of

the problems created by the interaction between the guidelines and mandatory minimum sentences.

Historical Development of Drug Sentencing Policy

Four laws enacted in the last 16 years principally shape the current sentencing structure for drug offenses: the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986, the Anti-Drug Abuse Act of 1988, and the Violent Crime Control and Law Enforcement Act of 1994.

The Sentencing Reform Act of 1984, Pub. L. 98 - 473, 98 Stat. 1837 (1984), extensively overhauled sentencing at the federal level by abolishing parole, limiting “good-time” credit in prison, and directing the promulgation of detailed, mandatory, determinate federal sentencing guidelines to be issued by a newly-created United States Sentencing Commission. In enacting the Sentencing Reform Act, Congress identified three basic objectives: (i) to establish certainty and honesty in sentencing, (ii) to assure more uniform federal court sentencing decisions so that similar defendants convicted of similar offenses would receive similar sentences, and (iii) to provide proportionality and just punishment in sentencing by directing the Commission to create a system that recognizes differences among defendants and offenses and provides appropriate sentences with those differences in mind. In the drug area, for example, an off-loader whose role consisted solely of assisting in unloading several bales of marijuana would receive a sentence different from that of the kingpin who organized the drug distribution ring and received the bulk of its illicit profits. *See* 28 U.S.C §§ 991(b), 994.

Before the initial guidelines could be completed, Congress enacted the Anti-Drug Abuse Act of 1986, Pub. L. 99 - 570, 100 Stat. 3207 (1986), which created the basic framework of mandatory minimum penalties currently applicable to federal drug trafficking offenses. The 1986 Act set up a new

regime of mandatory minimum sentences for drug trafficking offenses based on the type and amount of drug mixture involved in the offense. According to the report issued by the House Judiciary Committee following its consideration of an earlier version of the bill (H.R. 5395), the mandatory minimum scheme was designed to create proper incentives for the Department of Justice to direct its enforcement focus on “major traffickers” and “serious traffickers.” The Committee defined “major traffickers” as “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities” and intended that those persons would generally be subject to the ten year mandatory minimum sentences. Correspondingly, the Committee Report defined “serious traffickers” as “the managers of the retail level traffic, the person who is filling the bags of heroin, packaging the crack cocaine into vials . . . and doing so in substantial street quantities.” These persons generally were expected to receive the five year mandatory minimum terms. H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 16-17 (1986).

Based on this conceptual framework, the Act set specific quantity levels for the principal street drugs that would trigger five and ten year mandatory minimum penalties and that were thought to be generally associated with serious and major traffickers, respectively. Thus, for example, one kilogram or more of a mixture or substance containing heroin triggered the ten year mandatory minimum, as did five kilograms or more of a mixture or substance containing cocaine. *See* 21 U.S.C. § 841(b)(1)(A). Drug quantities such as 100 grams or more of a mixture or substance containing heroin, and 500 grams or more of a mixture or substance containing cocaine, triggered the five year mandatory minimum. In addition, the Act contained “heightened” mandatory minimum penalties for subsequent convictions that doubled the ten year mandatory minimum sentence to 20 years, and doubled the five year mandatory

minimum sentence to 10 years. Maximum penalties also were increased for these prior record offenders.

Congress further underscored its concern about drugs by enacting the Anti-Drug Abuse Act of 1988. Pub. L. 100 - 690, 102 Stat. 4181 (1988). At one end of the drug distribution chain, Congress amended 21 U.S.C. § 844 to provide a mandatory minimum of five years for simple possession of more than five grams of crack cocaine. At the other end, Congress doubled the existing ten year mandatory minimum under 21 U.S.C. § 848(a) for an offender who engaged in a continuing drug enterprise, requiring a minimum 20 year sentence in such cases. The Act also established for the first time mandatory minimum penalties for methamphetamine trafficking offenses.

Perhaps the most far reaching provision of the 1988 Act, however, was a change in the drug conspiracy penalties. This change made the mandatory minimum penalties previously applicable only to substantive distribution and importation/exportation offenses also applicable to conspiracies to commit these substantive offenses. *See* Pub. L. 100 - 690, § 6470(a), 102 Stat. 4377 (1988). Because co-participants in drug trafficking conspiracies may have widely different levels of involvement, this change increased the potential that the applicable penalties could apply equally to the major dealer and the mid- and low-level participant.

The Commission, which at the time Congress passed the 1986 Act had not yet promulgated its initial guidelines, responded to the 1986 Act by adopting the five and ten year mandatory minimum sentences, and the controlled substances and quantities associated with these mandatory minimum sentences, as basic reference points for the development of its drug trafficking offense guideline. *See* USSG §2D1.1, comment (n.10) (“The Commission has used the sentences provided in, and

equivalencies derived from, the statute (21 U.S.C. § 841(b)) as the primary basis for the guideline sentences.”). Trafficking in controlled substances and quantities listed in 21 U.S.C. §§ 841(b)(1)(A), offenses that carry a ten year mandatory minimum term of imprisonment, was assigned an “offense level” 32, which corresponds to a guideline range of 121 to 151 months for a defendant in criminal history category I (criminal history category I is associated with no or minimal criminal history; criminal history category VI is associated with a serious criminal history). Trafficking in the controlled substances and quantities listed in 21 U.S.C. § 841(b)(1)(B), offenses that carry a five year mandatory minimum term of imprisonment, was assigned an offense level 26, which corresponds to a guideline range of 63 to 78 months for a defendant in criminal history category I.

Using the above two reference points, the drug offense guideline was expanded upward and downward in two level increments to address trafficking in larger and smaller quantities of the controlled substances listed in 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B). Thus, for offenses involving drug quantities greater than those that trigger a mandatory minimum, the guidelines sentences progressively increase from the congressionally-set minimum to account for the greater quantity of drug involved. In addition, for offenses in which the defendant was deemed more culpable than a typical offender (*e.g.*, because the defendant used a weapon, had a prior criminal record, or took a leadership role in the offense), the guidelines provided for

enhanced penalties above the mandatory minimums to account for these indicia of greater offense and/or offender seriousness.

The interaction of the sentencing guidelines and mandatory minimum penalties causes some problematic results. In cases in which the guideline sentence is higher than the mandatory minimum, any applicable mitigating factors recognized by the guidelines (*i.e.*, acceptance of responsibility, reduced role in the offense) will operate to provide a proportionally lower sentence than would apply to a similarly situated offender who lacked these mitigating characteristics. Ironically, however, for the very offenders who arguably most warrant proportionally lower sentences – offenders who by guideline definitions are the least culpable – mandatory minimums generally operate to block the sentence reflecting mitigating factors. This means that these least culpable offenders may receive the same sentences as their relatively more culpable counterparts.

Congress sought to mitigate this apparent sentencing anomaly with the enactment of the “safety valve” provision contained in section 80001 of the Violent Crime Control and Law Enforcement Act of 1994. *See* H.Rpt. 103-460, 103rd Congress., 2d Sess. (1994). The safety valve relieves the defendant from being subject to a mandatory minimum sentence if the court finds: (1) the defendant does not have more than 1 criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense and was not engaged in a continuing criminal enterprise (as defined in 21 U.S.C. § 848); and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. 18 U.S.C. § 3553(f). In cases in which the

court

finds all of these factors, the defendant is sentenced in accordance with the applicable sentencing guidelines, without regard to any statutory minimum sentence. *Id.*

The Commission initially responded to the 1994 Act by promulgating a guideline, USSG §5C1.2., which essentially incorporates the statutory provision verbatim. In 1995, the Commission amended the drug trafficking guideline, USSG §2D1.1, to provide a downward adjustment of two offense levels for defendants who meet the safety valve criteria, but for whom, absent the amendment, relief from the mandatory minimum sentence would have no effect because their offense level as otherwise determined is level 26 or greater. As amended, the safety valve provisions in the guidelines now provide a minimum sentence of 24 months – the statutory minimum allowed under the directive to the Commission – for the least culpable category of defendants who meet the five safety valve criteria, with proportionally greater sentences for those who meet the criteria but are involved with higher drug quantities or have other factors that warrant an incremental increase in sentence.

Drug Sentencing Data

The Commission receives sentencing documents from federal courts for all felonies and Class A misdemeanors sentenced under the guidelines. During 1999, the Commission received sentencing information on approximately 55,000 offenders. For each case, the Commission extracts and enters into its comprehensive database more than 260 pieces of information, including case identifiers, sentence imposed, demographic information, statutory information, the complete range of court guideline application decisions, and departure information. From this database, the Commission has at its fingertips a wealth of information concerning drug sentencing. The Commission uses this information

to inform its consideration of amendments to the guidelines, as well as to inform others — including Congress — about sentencing policy matters. Because of time constraints, I can share only a small fraction of our data today, but we would be happy to respond to any specific data requests that you may have now or in the future.

General Observations

Since the advent of the guidelines and our data collection process, drug offenses have consistently accounted for approximately 40 percent of all sentenced federal criminal cases, and five drugs — powder cocaine, marijuana, crack cocaine, heroin, and methamphetamine — have consistently accounted for nearly all federal drug trafficking offenses. However, the contribution that each drug has made to the mix of sentenced drug offenses has varied considerably over time. Figure 1 shows the most prevalent drug type for each year from 1992 to 1999. The number of crack cocaine cases has doubled during this time, while the number of powder cocaine cases has dropped significantly, before rising again last year. In fact, powder cocaine was the most prevalent drug type in 1992, but by 1996 crack cocaine had surpassed powder cocaine to become the most prevalent drug type. Since 1996, however, the number of marijuana cases has increased dramatically to become the most prevalent drug type for the last three years.

The predominance of crack cocaine is also illustrated by Figures 2 and 3, which show the predominant drug type by state from 1992 to 1999. In 1992, crack cocaine was the predominant trafficked drug in only three states. However, by 1996, crack cocaine was the predominant drug type in 17 states (most of which are in the midwest and southeast). According to the most recent data, crack cocaine still is the predominant drug type in 10 states (again largely in the midwest and

southeast).

Equally dramatic has been the increase in the number of methamphetamine offenses. Like crack cocaine, the number of methamphetamine cases also has doubled during this time period. *See* Figure 1. The spread of methamphetamine perhaps can be best demonstrated by Figures 2 and 3. In 1992, methamphetamine was the predominant trafficked drug in only one state, Hawaii. By 1999, methamphetamine was the predominant drug in 12 states, all west of the Mississippi.

The mean length of imprisonment for each drug type for 1992 to 1999 is shown in Figure 4. Throughout this period, the mean sentences for crack cocaine offenses have been longer than for any other drug type, varying from 92 months to 118 months. The mean sentences for powder cocaine have been significantly shorter than sentences for crack cocaine (about two-thirds as long), which is not surprising given the different mandatory minimum provisions governing each drug. After crack cocaine, methamphetamine has been the most severely penalized drug, with a mean length of imprisonment ranging from 88 months to 113 months. The mean sentence for methamphetamine offenses is likely to increase in the coming years as the effect of the Commission's 1997 amendment to the drug quantity table for methamphetamine mixture becomes fully realized, and the 2000 amendment for pure methamphetamine becomes effective on November 1, 2000. The Commission expects methamphetamine offenders affected by the 2000 amendment to receive sentences 28.9 percent greater than sentences received in 1999.

Interactions of Mandatory Minimums with the Guidelines

Mandatory minimum sentences often trump guideline sentences for offenders who have

characteristics that tend to reduce the seriousness of the offense and/or the culpability of the defendant. However, because of the applicability of the mandatory minimum provisions, the full effect of the proportionate reduction in sentence provided by the guidelines is not always permitted. Thus, mandatory minimums can have a severe effect on some offenders who are less serious, less culpable defendants.

Figure 5 shows the percentage of cases in which defendants qualified for five offender and offense characteristics, some of which qualify the defendant for downward adjustments under the guidelines, but the mandatory minimum trumped the guideline sentence. Cases in which the mandatory minimum was mooted because the defendant qualified for the safety valve or benefitted from a government substantial assistance motion (*see* 18 U.S.C. § 3553(f); USSG §5K1.1) are excluded from this analysis. In approximately 60 percent of these cases the defendant qualified for a mitigating role reduction under USSG §3B1.2 (Mitigating Role), but the mandatory minimum trumped the guideline sentence, thereby nullifying the effect of the mitigating role on the resulting sentence.

Figure 5 also shows that approximately 38 percent of these defendants qualified for a downward adjustment for acceptance of responsibility under USSG §3E1.1 (Acceptance of Responsibility), but the mandatory minimum trumped the guideline sentence. Moreover, about one-third of defendants who were in criminal history category I, which means they have no or minimal criminal history, were subject to a mandatory minimum that trumped the guideline sentence. The same holds true for defendants with no weapons involved in the offense.

Figure 6 also appears to confirm that mandatory minimums trump the guidelines in a substantial

number of cases involving offenders who have offense and offender characteristics that should qualify them for proportionately lower sentences than some other offenders who receive the same mandatory minimum sentence. The percent of offenders who are subject to five year mandatory minimum sentences and who qualify for a mitigating role reduction has increased from approximately 14 percent in 1993 to approximately 22 percent in 1999. (The same table shows that defendants subject to mandatory minimum penalties of ten years are less likely, and those subject to heightened mandatory minimums of 20 years are far less likely, to qualify for a mitigating role adjustment, which is not surprising since those offenders typically are more serious offenders.) Figure 7 also evidences that offenders subject to the five year mandatory minimum provisions are not necessarily the most culpable offenders. Only five percent of defendants subject to five year mandatory minimums in 1999 qualified for a sentencing enhancement based on an aggravating role as provided by the guidelines.

USSG §3B1.1 (Aggravating Role).

Operation of the Safety Valve

Available data seem to indicate that the safety valve provision is operating as Congress intended. Overall, approximately 25 percent of drug offenders benefit from the safety valve provision. Application of the safety valve increased consistently from 1995 to 1998 and has leveled off since then, as indicated by Figure 8. In particular, for each of the past three years, the safety valve has applied in over 40 percent of the cases otherwise subject to a five year mandatory minimum, and to about 30 percent of those otherwise subject to a ten year mandatory minimum. (The same figure shows that defendants subject to 20 year mandatory minimum sentences rarely qualify for the safety valve, which is expected because they tend to be the most serious offenders with prior, disqualifying criminal history.)

Defendants who qualify for the safety valve, however, are still sentenced to substantial terms of imprisonment. Figure 9 shows that virtually all of the defendants who qualify for the safety valve received a sentence of imprisonment. Moreover, these defendants are sentenced on average to 59 months in prison, which is a substantial sentence. Offenders who do not qualify for the safety valve on average receive a much greater sentence, 102 months, which is consistent with Congress's intent in enacting the safety valve provision, and the Commission's intent in implementing it.

Demographic Effects of Mandatory Minimums

Commission data show two demographic trends with respect to the application of mandatory minimum sentences that may raise some concerns. First, Figure 10 shows that since 1993, the percent of mandatory minimum cases in which the defendant is white has decreased from 30 percent to approximately 23 percent, while the percent of such cases in which the defendant is Hispanic has increased from approximately 33 percent to almost 39 percent. Thus, during this period, Hispanics subject to mandatory minimums displaced white defendants on almost a one-to-one basis.

The percent of mandatory minimum cases in which the defendant is black has stabilized around 38 percent during the last three years. However, blacks are much more likely than white or Hispanic defendants to receive heightened mandatory minimum penalties, and the difference in the likelihood increases as the penalty increases. Figure 11 shows that in 1998 black defendants comprised only 30 percent of cases subject to a five year mandatory minimum. However, they comprise over 40 percent of cases subject to a ten year mandatory minimum, over 60 percent of cases subject to a 20 year mandatory minimum, and almost 80 percent of cases subject to a mandatory life term.

Conversely, whites and Hispanics are less likely to receive heightened mandatory minimum penalties as the mandatory term increases. Hispanic defendants comprise approximately 44 percent of cases subject to a five year mandatory minimum, 20 percent of cases subject to a 20 year mandatory minimum, and approximately 8 percent of cases subject to a mandatory life term. Similarly, white defendants comprise approximately 25 percent of cases subject to a five year mandatory minimum, approximately 17 percent of cases subject to a 20 year mandatory minimum, and approximately 13 percent of cases subject to a mandatory life term.

Caution should be advised in interpreting this data. While the data tend to show differing impacts according to race of the defendant, the data above cannot be said to establish systemic racial discrimination.

Concerns of Prior Commissions about Mandatory Minimums

Although Congress has ultimate authority over sentencing policy and has the prerogative to set mandatory minimum penalties, the past Commissions held the position that the more efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines. This approach permits the sophistication of the guideline structure, which in essence is a more proportionate, finely tuned system of presumptively mandatory sentences, to work. The Commission described in detail the problems created by mandatory minimums, and their interaction with the guidelines, in its Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (as directed by section 1703 of Public Law 101- 647). I will not review all of the issues raised by that report here, but I would like to highlight a few of them that are particularly relevant to drug sentencing policy.

Whereas the guidelines provide a substantial degree of individualization in determining the appropriate sentencing range for “each category of offense involving each category of defendant” as directed by 28 U.S.C. § 994(b)(1), mandatory minimums typically focus on only one or two indicators of offense seriousness (*e.g.*, the type and quantity of controlled substance involved in a trafficking offense), and perhaps one indicator of criminal history (*e.g.*, whether the defendant at any time was previously convicted of a felony drug offense).

As a result of the narrow, tariff-like approach employed by mandatory minimums, the same sentence may be imposed on divergent cases. For example, whether the defendant was a peripheral participant or the drug ring’s leader, whether the defendant used a weapon, whether the defendant accepted responsibility or, on the other hand, obstructed justice, all have no bearing on the mandatory minimum to which each defendant is exposed under the drug statutes.

The same tariff effect arises from doubling the mandatory minimum sentences for a single prior conviction for a felony drug offense under 21 U.S.C. § 841. The effect on the resulting sentence is the same whether the sentence for the prior conviction was probation or ten years, and whether the conviction occurred 20 years ago or one month ago. Equally problematic, if not more so, is the fact that the heightened mandatory minimums for prior felony convictions are applied inconsistently. In its mandatory minimum report, the Commission reported

prosecutors did not seek or obtain heightened punishments for prior drug felony convictions in 63 percent of the cases in which the defendant qualified for such an increased punishment.

Mandatory minimums also create a problematic cliff effect that creates sharp differences in

sentences for defendants who fall just below the threshold of a mandatory minimum compared with those whose criminal conduct just meets the criteria of the mandatory minimum provision. Just as mandatory minimums fail to distinguish among defendants whose conduct and prior records differ markedly, they may distinguish far too greatly among defendants who have committed offense conduct of highly comparable seriousness. This cliff effect is particularly glaring in the area of crack cocaine penalties. Section 844 of title 21, United States Code, mandates a minimum five year term of imprisonment for a defendant convicted of a first offense, simple possession of 5.01 or more grams of crack cocaine. However, a first offender convicted of simple possession of 5.0 grams of crack cocaine is subject to a *maximum* statutory penalty of one year imprisonment. The guidelines simply cannot harmonize a statutorily mandated four-year difference in penalties between defendants whose cases may differ only by .01 gram of crack.

Mandatory minimums also throw a functional block in front of guideline factors – in particular, a defendant’s reduced role in the offense and acceptance of responsibility – that might otherwise appropriately reduce the sentence below the applicable mandatory minimum. By requiring the same sentence for defendants who are markedly dissimilar in their level of participation in the offense and in objective indications of post-offense reform, these mandatory minimum provisions short-circuit the guidelines’ design of implementing sentences proportional to the defendant’s level of culpability.

Another problematic result arises from the change in the drug conspiracy penalties in the Anti-Drug Abuse Act of 1988. As indicated above, this change made the mandatory minimum penalties previously applicable to substantive distribution and importation/exportation offenses also applicable to conspiracies to commit these substantive offenses. *See* Pub. L. 100 - 690, § 6470(a), 102 Stat. 4377

(1988). The purpose of the legislation was to synchronize the penalties for conspiracies and their underlying offenses by ensuring that a defendant who is charged with only conspiracy is not in a better position for sentencing than one who is charged solely with possession of the same amount of narcotics. However, under the principles set forth by the Supreme Court in *Pinkerton v. United States*, 328 U.S. 640 (1946), a coconspirator is criminally liable for acts of other members in the conspiracy which are done “in furtherance of the conspiracy” and which are “reasonably foreseen as a necessary or natural consequence” of the conspiracy. Consequently, lower level drug offenders can have mandatory minimums triggered by the acts of other individuals involved in the joint undertaking when those acts are reasonably foreseeable. Moreover, the drug quantity used to determine whether a mandatory minimum is triggered (as well as for calculating offense levels under the guidelines) is calculated cumulatively during the entire course of the conspiracy. The result is that many smaller scale traffickers are swept into the mandatory minimum penalties and, as explained above, the mandatory minimums may then block the operation of guideline mitigators that otherwise would tend to adjust or proportionately differentiate sentences for these offenders.

Conclusion

In conclusion, I would like to recall some of the statements made by United States Supreme Court Justices concerning mandatory minimums and the sentencing guidelines. Chief Justice William Rehnquist has stated that “one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.” Remarks of Chief Justice, Nat’l Symposium on Drugs and Violence in America, June 18,

1993, at 10.

Associate Justice Stephen Breyer, in a recent speech, echoed the sentiments of the Chief Justice and stated “statutory mandatory sentences prevent the commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. Mandatory minimums will sometimes make it impossible for the Commission to adjust sentences in light of factors that its research shows to be directly relevant . . . and their existence then prevents the Commission from writ[ing] a sentence that make sense.” Justice Breyer further described Congress, in simultaneously requiring guideline sentencing and mandatory minimum sentencing, as “riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions.” Justice Breyer: *Federal Sentencing Guidelines Revisited*, FSR, Vol. 11, No. 4, Jan/Feb 1999, at 184-185.

In the final analysis, of course, it remains for Congress to shape and decide the basic framework for drug sentencing policy. However these issues may be addressed in the future, the Commission stands ready with its excellent data and research capabilities and its expertise to assist the Congress in any way it can. We look forward to working with the Congress in devising the most rational, just, and effective sentencing policies possible – for drug trafficking and other offenses.